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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 800

NORWICH, CONNECTICUT, PRINTING SPECIALTIES AND PAPER PRODUCTS UNION, LOCAL NO. 494 and INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS' UNION OF NORTH AMERICA, AFL-CIO, *Petitioners*,

v.

BOYD LEEDOM, ET AL., Individually and as Chairman and as Members of and Constituting the National Labor Relations Board, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The Findings of Fact and Conclusions of Law and the Order of the United States District Court for the District of Columbia, dated September 22, 1959, are printed at Record pp. 40-44. The opinion of the Court of Appeals for the District of Columbia Circuit is reported at — F. 2d —, dated February 18, 1960, and is set out in Appendix A, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1960 (Appendix A., *infra*). The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254 (1).

QUESTIONS PRESENTED

Whether the members of the National Labor Relations Board have exceeded their statutory authority under Section 9(b)(2) of the Labor-Management Relations Act, as amended, 61 Stat. 136 (1947), 29 U.S.C.A. #141-68 (1958) by refusing to direct a craft unit election among certain employees of a paper box manufacturer on the ground, among others, that a different and broader bargaining unit has been established by a prior Board determination?

STATUTES INVOLVED

Section 9(b)(2) of the Act provides in pertinent part:

> "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not * * * (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation * * *."

Section 7 of the Act reads as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations,

to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3)."

STATEMENT OF THE CASE

This case involves a specific statutory prohibition against the denial of a craft unit election on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit have voted against separate craft representation. It presents the question directly of whether the Board may escape the requirements of the statutory prohibition when its reliance upon a prior determination is professed to be only one of several supporting factors which allegedly caused its decision.

Petitioners are the International Printing Pressmen and Assistants' Union of North America, AFL-CIO, and its Norwich, Connecticut Local 494, composed of some 350 members employed in the printing and paper converting industries in and around Norwich, Connecticut. (R. 3), hereinafter referred to jointly as the Pressmen.

The International Printing Pressmen and Assistant's Union of North America is an international labor organization created in 1889 for the purpose of advancing the economic and craft status of employees engaged in the operation of presses in the several divisions of the printing industry, primarily the newspaper, com-

mercial and specialty printing divisions. An affiliate of the AFL-CIO, it is composed of more than 126,000 members divided among some 600 subordinate local unions, including petitioner Local 494. (R. 4).

From 1945 until 1959 the International Printing Pressmen's Union through its subordinate Local 494, represented a bargaining unit composed of production and maintenance employees of the Montville, Connecticut plant of the Robertson Paper Box Company as a result of a Board determination that such a unit was appropriate for collective bargaining purposes following a Board conducted, consent election held in 1945. (R. 11, 41)

On or about December 15, 1958, Local 493 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America filed a petition for a representation election in the production and maintenance unit represented by the Pressmen. (R. 5) At the hearing on this petition the Pressmen intervened through the general counsel for the International Union in behalf of the International and its subordinate Local Union 494. Specifically, the Pressmen asserted that the craft employees constituted a craft group entitled to vote separately as to whether they desired separate representation on a craft basis or continued inclusion in the broader bargaining unit. (R. 5-7).

On March 2, 1959 the Board issued a Decision and Direction of Election in which it denied the craft employees of the Company an opportunity to express themselves in a separate voting group. This decision was expressly based upon the ground that the Pressmen had represented other employees along with the craft employees since 1945, and that therefore the

Pressmen's insistence upon a separate election within a craft unit was wholly inconsistent with its unit position in collective bargaining with the employer. The Board said that in such circumstances "it will not effectuate the purposes of the Act to permit the alleged craft severance which it now seeks." (R. 10-12).

On March 24, 1959, after the Board had denied petitioners' request for reconsideration of the earlier decision, the Pressmen instituted this suit, and on the same day the Honorable Matthew McGuire U. S. District Judge, after notice to the Board, issued a temporary restraining order enjoining the Board from conducting an election in the overall plant-wide unit theretofore found appropriate by the Board in its decision of March 2, 1959. (R. 19-20)

Thereafter the Board reopened the proceedings for the purpose of taking additional evidence on the issue of the propriety of a proposed craft unit of pressmen. On August 6, 1959, after further hearing, the Board issued a supplemental decision in which it adhered to its earlier view that a craft unit limited to the Company's pressmen was not appropriate. In this supplemental decision the Board undertook to distinguish between the International Union and its subordinate Local 494, finding that the *Local* "is not a craft union but an industrial union." (R. 35) It said that "additional supporting factors" for this conclusion included the fact that "(1) Local 494 itself represented the employees involved herein on an overall production and maintenance basis for 13 years prior to the instant petition." It pointed out that while the International had frequently been found by the Board to be a "traditional representative" of printing pressmen in the paper box industry entitled to craft severance, its subordinate

Local 494 was a "printing specialties and paper products local" and could not therefore qualify as the "traditional representative" of craft employees under the criteria established by the Board in its *American Potash and Chemical Corporation* decision, 107 NLRB 1418 (R. 35-37).

Promptly after issuance of the August 6, 1959 decision the Pressmen filed a supplemental complaint alleging that the Board's continuing refusal to grant a separate vote to the pressmen craftsmen employed by the Robertson Paper Box Company violated the prohibition of Section 9(b) (2) of the Act and asserting further that the grounds advanced by the Board in support of its decisions and the Board's adherence to a plant-wide unit finding were predicated solely on a prior Board determination. (R. 24-28).

In response the Board moved to dismiss the complaint on the ground that the District Court lacked jurisdiction of the subject matter and that the complaint failed to state a claim. (R. 40)

On September 22, 1959, the District Court, Honorable Alexander Holtzoff, Judge, denied the Board's motion to dismiss and granted the Pressmen's motion for a preliminary injunction. The Court found as a fact that "Plaintiff Local 494 has represented the production and maintenance employees of the Robertson Paper Box Company in an over-all plant unit since 1945 as a result of a Board conducted consent election." (R. 41) It further found that one of the factors which the Board cited in support of its conclusion that no separate craft election should be directed was that "Local Union 494 itself represented the employees herein in an overall production and maintenance basis

for 13 years prior to the instant petition." (R. 42) The District Court then concluded that the Board's refusal to direct a craft unit election was a direct violation of Section 9(b)(2) of the Act in that the Board was precluded thereby from "relying upon a prior determination as one of the reasons for the Board's decision not to direct a separate craft election, even though it may not be the sole basis for that decision." (R. 42)

After appeal by the Board, the United States Court of Appeals for the District of Columbia Circuit issued its decision, dated February 18, 1960, directing that the preliminary injunction issued by the District Court be set aside and that the case be remanded to the District Court with directions either to dismiss the complaint or to take such further action as not inconsistent with the opinion. (R. 63-68).

The opinion of the Court of Appeals correctly states that the issue is whether the Board in reaching its decision as to the appropriate unit disregarded any statutory limitation upon the discretion vested in the Board by section 9(b) of the Act; that is whether craft employees were denied a statutory right. (R. 64-65) It then reasoned, however, that even if the Board's first decision could properly be construed as based on the ground that a different unit had been established by a prior Board determination, thus violating the restraint imposed on the Board by section 9(b)(2), the supplemental decision "cured any such possible violation of that section." It cured any such defect because "The Board decision that the craft unit was inappropriate was not on the ground that a different unit had been established by a prior Board determination, but on the ground that the union seeking the craft unit was

not a traditional representative of a specific craft." (R. 5) In its view, the denial of a separate craft unit election on this ground was within the Board's discretion in applying its own *American Potash* doctrine, which, at least in words, restricts the right to seek craft elections to unions which traditionally represent craft groups. (R. 5-6)

The court below made no effort to come to grips with petitioner's argument and the District Court's conclusion that Section 9(b) (2) precludes the Board from relying upon a prior determination as one of the reasons for denying a separate craft election, nor the argument that Sections 7 and 9(b)(2) of the Act effectively prohibit the Board from administratively superimposing a "traditional representation" test upon the union invoking Section 9(b)(2) as a condition limiting the the right of craft employees to vote separately for craft representation.

This petition is filed seeking review of the erroneous decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals has decided a federal question in a way in conflict with this Court's decision in Leedom v. Kyne, 358 U.S. 184, thereby adversely affecting the statutory rights of millions of craft employees in the United States to separate craft elections without reference to prior Board determinations.

This Court's decision in *Leedom* v. *Kyne*, said in effect that the Board could not include professional and non-professional employees in the same bargaining unit absent an affirmative vote of the professional employees in a separate election among themselves. This was so because Section 9(b)(1) of the Act expressly prohibited such a commingling of employees without a separate election limited to the professionals.

Section 9(b)(2) of the Act, which follows the text of Section 9(b)(1), extends this same prohibition or interdiction to elections among craftsmen or employees in proposed craft units. This section prohibits the Board in mandatory language ("The Board shall not. . . .") from ruling a craft unit inappropriate on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation.

In this case the Board has conceded, both in its original and its supplemental decisions, and the District Court so found, that at least one of the reasons for refusing to direct a craft unit election is that a prior Board determination in a Board conducted consent election established a broader unit of production and maintenance employees. In the first Board decision of March 2, 1959, a craft unit was rejected because the union seeking such an election had bargained for a larger unit since 1945 pursuant to the Board's 1945 consent election. (R. 11, fn 3) In the supplemental Board decision of August 6, 1959 the Board said that one of three supporting factors which warranted its refusal to direct a separate craft unit election was that petitioner Local Union 494 had represented the employees involved in an overall production and maintenance unit since the 1945 election for 13 years prior to the present case. (R. 35) The District Court ruled that the Board had relied upon a prior determination as one of the reasons for its refusal to direct a separate craft election and hence its refusal to direct a vote in a craft unit was contrary to Section 9(b)(2) of the Act. (R. 42)

The Court of Appeals ignores these findings of the Board and the District Court and focuses its attention instead upon the Board's assertion that the union seeking the craft unit was not a "traditional representative" of a specific craft, and hence not entitled to represent craft employees under any circumstances.

We submit the Court of Appeals has evaded an issue of great consequence to the millions of employees who are craftsmen. If a tainted or illegal reason is one of the grounds for refusing a craft election, the Board cannot be absolved from violation of the statute by the simultaneous statement of other or supporting reasons.

The legislative history of Section 9(b)(2) of the Act shows plainly that it was intended to protect not craft unions, but craft employees. Indeed, one of the advocates of the provision said in the Congressional Record that "Both craftsmen and professional employees are protected by these amendments from having their wishes submerged by being thrown into a large unit of production and maintenance employees. This bill gives craftsmen and professional employees the right to vote in separate units."[1] Section 9(b)(2) was the legislative culmination of a long and bitter fight between the AFL craft unions, on the one hand and the CIO industrial unions on the other, and Congress intended to balance their bargaining powers, but it did not propose to do so by vesting statutory rights in unions as such. On the contrary it sought to protect craft employees in accordance with Section 7 of the Act in their right to choose any or no collective bargaining representative.

[1] Vol. 1, Legislative History of Labor Management Relations Act, 1947, Bureau of National Affairs.

The Court of Appeals, by accepting the Board's "traditional representation" test of whether a particular union may act for craft employees, reads into Section 9(b)(2) an impermissible condition; namely that Congress intended to protect the rights of craft unions instead of craft employees. The Board itself has rejected this specious logic on numerous occasions. See, for example, *Friden Calculating Machine Company, Inc.*, 110 NLRB 1618, where the Board held that a union newly organized for the purpose of representing craft employees satisfied the "traditional representative test" of *American Potash*; and *Lily Tulip Cup Corporation* v. *Leedom*, No. 17-RC-2983 (July 2, 1959) where the Board permitted a union which had never before sought to represent craftsmen to seek an election in a group of printing pressmen.

The Court of Appeals has not only erred in its assumption that Section 9(b)(2) allows the Board in its discretion to deny craft employees a right to a separate election because it questions the craft identity or qualifications of the union seeking the election; its acceptance of the Board's attempted distinction between the International Union and the subordinate Local Union is both hypertechnical and unrealistic. The Board conceded that the International Union met its "traditional representative" test, (R. 35) but argued that Local 494 did not because it had never before sought to represent craft employees separately. (R. 35-36) Aside from the fact that Local 494 has actually represented printing crafts at Montville, Connecticut for over 13 years as a result of a prior Board determination, it must be noted that the International and the Local are inseparable, coordinate entities, parent and child. They appeared at the hearing through the same counsel; the local is by definition subordinate to the International;

the "traditional representative" status of the International which is acknowledged by the Board, permeates the blood stream of the Local. As Judge Parker, speaking for the Fourth Circuit Court of Appeals, said in *National Labor Relations Board* v. *Libbey-Owens Glass Company*, 241 F. 2d 831 (1957), "the hypertechnicial argument that a distinction should be made in this regard between the I.B.E.W. and its local is so obviously lacking in merit as not to warrant discussion."

The policy expressed in *Leedom* v. *Kyne* was the culmination of twenty years of litigation over the statutory restraints upon exercise of Board discretion. In *American Federation of Labor* v. *Labor Board*, 308 U.S. 401 (1939), twenty years ago the Supreme Court reserved ruling on the question of whether a District Court could enjoin unlawful action of the Board in excess of its statutory authority, as distinguished from the right of review of Labor Board action by a Court of Appeals in an unfair labor practice proceeding where the issue involved possible arbitrary exercise of a discretion conferred on the Board by the statute. Six years later in *Inland Empire Council et al.* v. *Millis*, 325 U.S. 697 (1945), the Supreme Court called attention to its reservation in *AFL* v. *Board*, *supra* of the issue of whether apart from Section 10 proceedings, review of certification may be had by an independent suit brought pursuant to Section 24 of the Judicial Code. Then in a series of decisions, all preceding enactment of Taft-Hartley in 1947, this Court apparently upheld an almost unlimited exercise of Board discretion in representation proceedings. Largely as a result of these decisions, however, Congress in each instance added a specific and mandatory section to Taft-Hartley in order to limit the Board's discretion.

For example, in *NLRB* v. *Hearst Publications*, 322 U.S. 111, (1944), the Supreme Court upheld the Board's direction of an election among news vendors notwithstanding a company argument that such persons were in fact and and in law independent contractors. To meet the problem created by this decision Congress in new Section 2(3) of the 1947 Act added a proviso excluding persons having the status of independent contractors from the coverage of the Act, and in so doing Congress referred to the Board's *Hearst* decision by name. In *May Department Stores Co.* v. *N.L.R.B.*, 326 U.S. 376 (1945), the Supreme Court upheld the Board's discretion to establish a bargaining unit with no other justification than the union's ability to organize one segment of the employer's employees. This decision led to Section 9(a)(5) of the 1947 Act which mandatorily prohibits the Board from so doing. In *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947), the Supreme Court upheld a Board holding that foremen were entitled to select their collective bargaining representative under the statute. This led to Section 2(11) of the 1947 Act excluding supervisors from its coverage. Indeed, it can be concluded from these decisions that Congress inserted rigid and mandatory language in several sections of the 1947 Act, including Section 9(b)(2), for the specific purpose of restraining the Board's unlimited exercise of discretion.

Thus for the Court of Appeals to hold that the Board has discretion to read into the plain langauge of Section 9(b)(2) the qualification that the union seeking a craft election must be a traditional representative of the affected craftsmen, is to upset the entire statutory scheme, override clear Congressional purpose and ig-

more *Leedom v. Kyne* to the detriment not necessarily of craft unions, but of millions of craft employees throughout the United States. The fundamental right of these employees under Section 7 of the Act is to a choice between any union and no union; this right is not protected when the Board, in the guise of exercise of discretion, limits the choice to unions whose craft identification and tradition are approved by the Board and at the same time relies in part on a prior Board determination which it deems inconsistent with the present craft claims of the union.

II. The decision of the Court of Appeals for the District of Columbia Circuit is in conflict with the recent decision of the Court of Appeals for the Fourth Circuit in NLRB v. Pittsburgh Plate Glass Co., 270 F. 2d 167 (4th Cir. 1959), cert. den. —— U.S. ——.

There is a square conflict between the decision of the Court of Appeals for the District of Columbia Circuit in this case and the decision of the Fourth Circuit in *NLRB* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167 (4th Cir. 1959), cert. den. —— U.S. ——. In the latter case on review of a final order of the Board pursuant to section 10(e) of the Act, the court held a true craft union which traditionally represented electricians was not entitled to bargain separately for craft employees in a highly integrated plant. Notwithstanding the traditional representative status of the craft union the Court found that the Board had applied its *American Potash* doctrine in an arbitrary and discriminatory manner since certain highly integrated industries were excluded from the application of the doctrine while other equally integrated industries were apparently covered.

Thus in *Pittsburgh Plate Glass*, one Circuit Court holds that even if the union seeking craft representa-

tion is a "traditional representative" within the meaning of that much abused term as set forth in *American Potash*, it may not bargain separately for the craft in a highly integrated industry despite victory in a separate election, because the Board has applied *American Potash* in an arbitrary and discriminatory manner. In this case the Court of Appeals for the District of Columbia Circuit takes the obverse of this proposition and says that a local union which is not a traditional representative, may not even seek a separate craft election.

The result of the two decisions, read together, is to riddle the *American Potash* doctrine full of legal holes. *American Potash* established two tests for entitlement to participation in separate craft elections: (1) existence of a true craft group and (2) a petition for a craft election filed by a union which had traditionally represented such groups. Now one Court of Appeals says the traditional representation test has no validity in a highly integrated industry because the Board itself applies this test arbitrarily among different industries, and another Court of Appeals rest its entire decision on the Board's administrative discretion to impose such a test as a condition to the exercise of rights conferred by Section 9(b)(2) of the Act.

The issue on which this conflict exists is plainly one of the utmost importance. If the District of Columbia Circuit is correct, the fact of traditional representation may be decisive of a case; if the Fourth Circuit is correct, traditional representation by a union seeking a craft election is meaningless. A failure to resolve this conflict in Circuit Court decisions will put in doubt the rights of millions of craft employees throughout the United States. It will cause endless confusion

among craft and industrial unions and employees as to the meaning of Section 9(b)(2) of the Act and the extent of the Board's jurisdiction under the statute.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for certiorari should be granted.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15381

BOYD S. LEEDOM, ET AL., Individually and as Chairman and Members of and constituting the National Labor Relations Board, *Appellants*

v.

NORWICH, CONNECTICUT PRINTING SPECIALTIES AND PAPER PRODUCTS UNION, LOCAL NO. 494, AND INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS' UNION OF NORTH AMERICA, AFL-CIO, *Appellees*

Appeal from the United States District Court for the District of Columbia

Decided February 18, 1960

Mr. Norton J. Come, Deputy Assistant General Counsel, National Labor Relations Board, with whom *Messrs. Thomas J. McDermott*, Associate General Counsel, National Labor Relations Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, were on the brief, for appellants.

Mr. Warren Woods for appellees. *Mr. Edward G. Villalon* also entered an appearance for appellees.

Before FAHY, BASTIAN and BURGER, *Circuit Judges*.

FAHY, *Circuit Judge*: The members of the National Labor Relations Board, to whom we shall refer as the Board, appeal from an order of the District Court granting

a preliminary injunction against the Board in an action by two labor organizations, one the Norwich, Connecticut Printing Specialties and Paper Products Union, Local No. 494, referred to as Local 494, and the other the International Printing Pressmen and Assistants' Union of North America, AFL-CIO, referred to as the International. The appeal is also from denial by the court of the Board's motion to dismiss the complaint.

The court enjoined an election directed by the Board to be held in a bargaining unit composed, with certain immaterial exceptions, of the production and maintenance employees of a paper box plant of the Employer, Robertson Paper Box Company, at Montville, Connecticut.[1] The basis for the injunction was the claim of Local 494 and of the International that the Employer's craft employees, to wit, its printing pressmen, cutting and creasing pressmen, apprentices, helpers and related employees consisting of die makers, ink makers and plateroom employees, were an appropriate unit entitled to an election in a unit limited to such craft grouping, to the end of being able to vote for or against separate representation on a craft basis, said to be required by Section 9(b)(2) of the Labor-Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. §§ 141-68 (1958).

Our question is not whether on the one hand the unit sought by Local 494 and the International, or, on the other hand, the unit fixed by the Board, is the appropriate bargaining unit, but whether the Board in reaching its decision as to the unit disregarded any statutory limitation upon the discretion vested in the Board by section 9(b) of the

[1] The election was to be for the purpose of determining whether these employees chose to be represented by the General Teamsters, Chauffeurs and Warehousemen Local No. 493, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, by plaintiff Local No. 494, by the United Mine Workers of America, District 50, by the United Papermakers and Paperworkers, AFL-CIO, or by none.

Act; that is, whether the craft employees were denied a statutory right.[2] If the latter, the District Court, under the authority of *Leedom* v. *Kyne*, 358 U.S. 184, affirming 101 U.S. App. D.C. 398, 249 F. 2d 490, should be upheld in granting the preliminary injunction and in not dismissing the complaint. If the Board merely exercised the discretion available to it, however,[3] the District Court was without jurisdiction and erred in enjoining the election. Review of the appropriateness of the unit in that event could be had only in a proceeding in a United States Court of Appeals under section 10(e) or 10(f) of the Act.[4] *National Biscuit Div.* v. *Leedom*, 105 U.S. App. D.C. 117, 119, 265 F. 2d 101, 103, *cert. denied*, 359 U.S. 1011.

Appellees claim the Board violated the proviso in section 9(b)(2), *supra* note 3, which prohibits the Board from deciding that a craft unit is inappropriate "on the ground that a different unit has been established by a prior Board determination. . . . ." We are not able to sustain this contention.

In its original Decision and Direction of Election, supporting a statement in the text of the Decision that the

[2] No constitutional right is asserted to have been denied.

[3] Section 9(b) of the Act provides in pertinent part:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not * * * (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation * * *.

[4] Section 9(d) of the Act provides that upon petition for enforcement or review of an order of the Board certification proceedings may be made a part of the record to be reviewed.

production and maintenance employees at the plant, with certain exclusions, were an appropriate unit, the Board in a footnote stated, as set forth more fully in the margin,[5] that the Pressmen (the International) had represented this overall unit since 1945 and had also negotiated for a new contract on that basis until the instant petition was filed, though the Pressmen now contended for both a craft unit and also a separate other unit composed of the production and maintenance employees other than the craftsmen. Even could this reference to prior history properly be construed as basing the decision on the ground that a different unit had been established by a prior Board decision, violating the restraint imposed on the Board by section 9(b)(2), we think the Supplemental Decision and Second Direction of Election, the one enjoined, cured any such possible violation of that section. The Supplemental Decision and Second Direction of Election called for an election on a plant-wide basis, that is, in the same unit as previously. But it

[5] The footnote reads in full:

> The Petitioner [Teamsters' Local No. 493], the UMW, and the Papermakers, seek the existing overall production and maintenance unit. The Pressmen, which has represented this overall unit since 1945 as a result of a consent election, now contends, however, that this unit should be divided into one alleged craft unit of printing pressmen and various other employees, and another unit of the remaining production and maintenance employees. The Pressmen not only has represented the overall unit since 1945, but negotiated for a new contract on that basis until the instant petition was filed, with the negotiations being terminated then only by the Employer because of the filing of the petition. In such circumstances, we find that the Pressmen's unit position here is wholly inconsistent with its unit position in collective bargaining with the Employer, and that it will not effectuate the purposes of the Act to permit the alleged craft severance which it now seeks. See *American Radiator and Standard Sanitary Corporation*, 119 NLRB No. 32, and cases cited. Accordingly, we shall direct an election in the existing overall production and maintenance unit.

relied for the unit determination on evidence, introduced by the Employer at a reopened hearing, to the effect that Local 494, as distinguished from the usual "Printing Pressmen" locals of the International, was not a craft union and had not traditionally organized or represented employees on a craft basis. The Board detailed to a considerable extent the evidence to this effect, including a reference in the International's constitution to "printing specialty and paper products workers covered on an industrial basis," and concluded that Local 494 was not a craft but an industrial union. It then stated that additional support for this position was found in the fact that the Local itself had represented the employees here involved on an overall production and maintenance basis for thirteen years prior to the instant petition. The Board relied on *American Potash & Chem. Corp.*, 107 N.L.R.B. 1418 (1954), in which it was held that severance from a plant-wide unit will be allowed "where a true craft group is sought and where, in addition, the union seeking to represent it is one which traditionally represents that craft." *Id.* at 1422. On the ground that Local 494 was not a traditional representative of a craft union, the Board denied craft severance.

We do not find in the foregoing a violation of section 9(b)(2). The Board decision that the craft unit was inappropriate was not on the ground that a different unit had been established by a prior Board determination, but on the ground that the union seeking the craft unit was not a traditional representative of a specific craft. The mere reference to past bargaining history for "additional support" we think cannot be construed in the circumstances of this case as deciding "that any craft unit is inappropriate . . . on the ground that a different unit has been established by a prior Board determination."

The soundness of the *American Potash* doctrine is not before us; for, as we see the matter, that doctrine lies

within the discretionary area of Board unit determinations.[6] Whether or not the Board has wisely exercised its discretion in formulating or applying the doctrine is apart from the question whether the Board has failed to give effect to a clear statutory command in this case, so as to justify intervention by the District Court in the normal process of determining an appropriate bargaining unit under the Act.

The preliminary injunction is set aside and the case is remanded to the District Court with directions either to dismiss the complaint or to take such further action as is not inconsistent with this opinion.

It is so ordered.

[6] For a successful attack on a particular application of the *American Potash doctrine, see NLRB* v. *Pittsburgh Plate Glass Co.*, 270 F.2d 167 (4th Cir. 1959), *cert. denied*, —— U.S. ——. There, on review of a final order of the Board pursuant to section 10(e) of the Act, the court held the Board's permission of craft severance by a numerically small craft union in a highly integrated plant was arbitrary and discriminatory, notwithstanding the union was a true craft union and a traditional representative of that craft.

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No. 800

In the Supreme Court of the United States

OCTOBER TERM, 1959

NORWICH, CONNECTICUT PRINTING SPECIALTIES AND PAPER PRODUCTS UNION, LOCAL NO. 494, ET AL., PETITIONERS

v.

BOYD LEEDOM, ET AL., AS CHAIRMAN, AND AS MEMBERS OF AND CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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CITATIONS

Cases:

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Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):	
Section 9(b)(2)	4, 6, 7, 8, 9
Section 10	9

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OPINIONS BELOW

The order of the District Court granting petitioners' motion for a preliminary injunction, and its findings of fact and conclusions of law in support thereof, are set forth at R. 40-44.[1] The opinion of

[1] References are to the portion of the record printed as a Joint Appendix to the briefs in the court below.

the court below (Pet. 1a-6a), reversing the District Court and setting aside the preliminary injunction, is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1960 (Pet. 1a). The petition for a writ of certiorari was filed on March 18, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the District Court has jurisdiction to review a Board determination under Section 9 of the National Labor Relations Act that a plant-wide, rather than a craft, unit is appropriate for bargaining purposes, where the reasons for rejecting a craft unit turn on considerations involving an exercise of judgment and discretion and do not encounter any statutory prohibition.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at pp. 2-3 of the petition.

STATEMENT

A. The Board representation proceeding

Petitioners are two labor organizations, the International Printing Pressmen and Assistants' Union of North America, AFL-CIO (hereafter called the International), and its affiliated subordinate, Norwich

Printing Specialties and Paper Products Union, Local 494 (hereafter called Local 494). Since 1945, Local 494 has represented all of the production and maintenance employees of the Robertson Paper Box Co., at its Montville, Connecticut plant, in a single plant unit, as a result of a Board-conducted consent election (R. 3-4, 40, 41, 11, n. 3). In December 1958, Local No. 493 of the International Brotherhood of Teamsters petitioned for a representation election in this bargaining unit. The incumbent Local 494 intervened in the Board proceeding,[2] and requested that the pressmen and certain other employees in the plant, who were alleged to constitute a true craft group, be severed from the overall plant unit and given an opportunity to vote separately on whether they desired representation as a craft or continued inclusion in the overall unit (R. 5, 10, 41, 5-6). The Board rejected this request, in a decision issued on March 2, 1959, directing an election in the overall plant unit. The Board pointed out that the unit position of Local 494 in the representation proceeding was "wholly inconsistent with its unit position in collective bargaining with the Employer" (R. 41, 6, 10-12, 11, n. 3). For Local 494 "not only has represented the overall unit since 1945, but negotiated for a new contract on that basis until the instant petition was filed, with the negotiations being terminated then only by the Employer because of the filing of the petition" (*ibid.*).

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[2] Two other unions were also permitted to intervene (R. 10, n. 1).

Local 494 petitioned the Board for reconsideration of its decision on the ground that the denial of a separate election for the alleged craft employees was contrary to Section 9(b)(2) of the Act (set forth at p. 2 of the petition). At the same time, it amended its unit request, seeking severance of only the pressmen and their assistants and helpers. On March 20, the Board denied the motion for reconsideration (R. 41, 31, 12-17, 6).

However, on March 25, the Board issued a notice to show cause why it should not find appropriate a craft unit of pressmen, as specified in Local 494's amended request. The employer responded with an offer to prove that Local 494 was not a traditional representative of craft employees, and, accordingly, that its craft unit request did not satisfy one of the criteria for the establishment of craft units enunciated in *American Potash & Chemical Corporation*, 107 NLRB 1418.[3] On April 9, the Board reopened the record and remanded the case to the Regional Director for further hearing on the issue of the appropriate unit (R. 41, 29-30). At the reopened hearing, the only evidence introduced was that by the employer; it was intended to show that Local 494 had customarily organized employees in the paper box industry on an industrial, rather than a craft, basis. (R. 32).

[3] In this decision the Board announced that it would permit a craft unit to be severed from a pre-existing larger unit only where the employees sought to be severed constituted a true craft group, and the union seeking to represent them separately specialized in representing that craft.

On August 6, the Board issued a supplemental decision. It again directed an election in an overall plant unit, predicating its renewed denial of Local 494's request for a craft unit election solely upon a finding, based upon the evidence adduced by the employer, that "Local 494 is not a qualified 'traditional representative' under *American Potash* for purposes of the alleged craft severance which it seeks" [4] (R. 42, 37, 31-38, 41-42). Analyzing this evidence—which consisted of provisions in the International's Constitution, statements in union journals, and typical contracts of Specialty Unions like Local 494 (R. 32-35)—the Board concluded that it showed that a "Printing Specialties and Paper Products" local was different from a regular "Printing Pressmen" local of the International, in that it was "not a craft union but an industrial union." The Board also noted that this conclusion was confirmed by certain other factors, including the fact that "Local 494 itself represented the employees involved herein on an overall production and maintenance basis for 13 years prior to the instant petition" (R. 35, 42).

B. The Judicial Proceedings

Petitioners brought suit in the District Court to have the Board's decision and direction of election enjoined and set aside. Their supplemental complaint alleged that the Board's renewed denial of a separate

[4] In view of this finding, the Board found it unnecessary to pass upon the further question whether the alleged craft unit sought was a true craft unit under *American Potash* principles (R. 37, n. 10, 42).

vote to the supposed craft unit sought by Local 494 violated Section 9(b)(2) of the Act (R. 26-28, 3, 23, 24). In response, the Board moved to dismiss the complaint on the grounds that the court lacked jurisdiction of the subject matter and that the complaint failed to state a claim warranting relief (R. 40).

On September 22, the District Court denied the Board's motion to dismiss and granted petitioners' motion for a preliminary injunction to enjoin the election directed by the Board (R. 43-44). The court —viewing the Board's reference to Local 494's thirteen-year history as the bargaining representative of the employees involved on an overall production and maintenance basis as reliance on a prior Board determination—concluded that the Board had, at least in part, based its denial of a craft unit on the ground forbidden by Section 9(b)(2) (R. 42, 60, 55-56). Accordingly, it held that it had jurisdiction to enjoin the Board election under *Leedom* v. *Kyne*, 358 U.S. 184.

On appeal, the court below set aside the preliminary injunction and remanded the case to the District Court with directions either to dismiss the complaint or to take such further action as would not be inconsistent with its opinion (Pet. 6a). The Court of Appeals held, contrary to the District Court, that the Board's denial of a craft unit did not violate Section 9(b)(2) because it was not based, even in part, upon the ground that a different unit had been established by a prior Board determination. Rather, the

denial was predicated upon the failure of Local 494 to satisfy the traditional representative requirement of the *American Potash* criteria, which criteria lie "within the discretionary area of Board unit determinations" (Pet. 5a-6a). In these circumstances, the Court of Appeals concluded, the District Court lacked jurisdiction to review the Board's denial of a craft unit in this case.

ARGUMENT

1. *Leedom* v. *Kyne*, 358 U.S. 184, permits an exception to the general rule that Board representation determinations are not reviewable in the district court where it is plain that the Board has exceeded statutory or constitutional requirements and no other adequate remedy exists for redress of the wrong. In the absence of such a showing, district court review is barred. See *National Biscuit Division* v. *Leedom*, 265 F. 2d 101 (C.A. D.C.), certiorari denied, 359 U.S. 1011. The statutory provision that the Board is alleged to have violated in this case is Section 9 (b) (2), which provides that the Board shall not decide that any craft unit is inappropriate for bargaining purposes "on the ground that a different unit has been established by a prior Board determination." The District Court found a violation of this provision because the Board, in its decision, alluded to the fact that Local 494 had previously represented the employees in question in a plant-wide unit, a status which stemmed from a Board-conducted consent election. The Court of Appeals, on the other hand, con-

cluded that there was no violation of Section 9(b)(2) because, reading the Board decision as a whole (R. 31-37), it was evident that the only basis for the denial of a craft unit was that Local 494 had failed to meet the "traditional representative" requirement of the Board's *American Potash* criteria (n. 3, *supra*). The reference to Local 494's prior bargaining history was not an independent ground for decision, but merely an additional factor cited to support the conclusion, already reached on the basis of other ample evidence, that Local 494 did not customarily represent employees on a craft basis. The Court of Appeals' reading of the Board's decision is manifestly correct. In any event, a narrow issue of this kind, turning on the individual terms of a particular Board decision, does not call for review by this Court.

2. Although petitioners attempt to inject the issue (Pet. 10-14), the propriety of the Board's *American Potash* criteria for the establishment of craft units is not presented. As pointed out above, the District Court has jurisdiction only if it can be shown that the Board has violated a statutory or constitutional prohibition,[5] and the only statutory restriction on the Board's discretion in respect to permitting or not permitting a craft unit is that such unit should not be denied solely because the Board had previously found a different unit appropriate. The *American Potash* criteria clearly do not rest on a prior Board determination; under them, Local 494, had it been the tradi-

[5] As the Court of Appeals noted (Pet. 3a, n. 2): "No constitutional right is asserted to have been denied" in this case.

tional craft representative and had the employees which it sought to represent separately been a true craft group, would have been entitled to a separate craft election irrespective of what the prior bargaining unit had been. Hence, whatever may be said about the propriety of these criteria, they do not involve a violation of Section 9(b)(2), but merely relate to how the Board shall exercise the discretion which it has under the Act in respect to defining appropriate units. As the Court of Appeals recognized (Pet. 5a-6a), questions relating to the proper exercise of the Board's discretion in representation cases cannot be raised in a district court suit, but only in review proceedings under Section 10 of the Act.[8]

3. Contrary to petitioner's contention (Pet. 14-16), the decision below does not conflict with *National Labor Relations Board* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167 (C.A. 4), certiorari denied, 361 U.S. 943. In *Pittsburgh*, the Board, on the basis of the *American Potash* criteria, selected a craft group as an appropriate unit. The Court of Appeals, in refusing to en-

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[8] Although not germane to this suit, it may be noted that the "traditional representative" requirement of the *American Potash* criteria is a reasonable means of accommodating the Act's competing objectives of maintaining stability and of giving special recognition to the interests of craft employees. The requirement insures that an existing bargaining relation will not be broken up just for the sake of change or because a rival union has embarked on a raid, but only where the loss to stability is compensated for by some net gain to the craft employees, *i.e.*, a representative who truly specializes in and understands their problems. See *Libby-Owens-Ford Glass Co.*, 115 NLRB 1452, 1456-1457, enforced, 241 F. 2d 831 (C.A. 4).

force a Board order directing the employer to bargain with the union that the members of the craft unit had selected, held (270 F. 2d at p. 172) that the Board had erred in narrowing its discretion in respect to defining appropriate units to "the flat rule" of *American Potash* "that craft units must be split off from an established industrial unit whenever requested by a union that traditionally represents employees in the craft * * *".

Pittsburgh thus held that the Board cannot designate a craft unit merely because the employees involved request it and the union traditionally represents members of that craft, but must "decide *in each case* what unit would be most appropriate to effectuate the overall purpose of the Act to preserve industrial peace" (*id.*, p. 173). It did not hold, or even suggest, that the Board cannot require, as one of the conditions for selecting a craft unit, that the union involved be one that traditionally represents members of the craft. In the instant case, the Board did not designate a craft group as the appropriate unit, but merely refused to do so because the union lacked a significant qualification. The Board's action in directing that the election be held on a plant-wide basis is thus consistent with the *Pittsburgh* decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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